No. 1

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

WILLIAM MARCUS, TITLE NEWS COMPANY, HOMER SMAY, KANSAS CITY NEWS DISTRIBUTORS, JACK GORDON, HARVEY HAMMER, TOWN BOOK STORE, RUBACK'S NEWS STAND, JACK K. RAYBURN, and TED'S NEWS SHOP,

Appellants,

v.

SEARCH WARRANT OF PROPERTY AT 104 EAST TENTH STREET, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 3105 EUCLID, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 1 EAST THIRTY-NINTH STREET, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 123 EAST TWELFTH STREET, KANSAS CITY, MISSOURI, SEARCH WARRANT OF PROPERTY AT 5 WEST TWELFTH STREET, KANSAS CITY, MISSOURI, AND SEARCH WARRANT OF PROPERTY AT 221 EAST TWELFTH STREET, KANSAS CITY, MISSOURI,

Appellees.

On Appeal from the Supreme Court of Missouri, En Banc.

JURISDICTIONAL STATEMENT.

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Appellees.

On Appeal from the Supreme Court of Missouri, En Banc.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the Supreme Court of Missouri, en banc, entered on March 14, 1960, affirming a judgment of the Circuit Court of Jackson

County, Missouri, and submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW.

The opinions of the Supreme Court of Missouri, en banc (Appendix A, infra p. 18), are reported at 334 S. W. 2d 119. The opinion of the Circuit Court of Jackson County, Missouri (Appendix A, infra p. 33), is not reported.

JURISDICTION.

These proceedings were brought under Sections 542.380, 542.390, 542.400, 542.410 and 542.420 R. S. Mo., 1949, and Rule 33 of the Rules of the Supreme Court of the State of Missouri, which statutes and rule provide for the summary seizure of publications under search warrant and authorize their destruction if found to be obscene by a Court after seizure and a hearing. The judgment of the Supreme Court of Missouri, en banc, was entered on March 14, 1960 (Appendix A, infra p. 38), a timely petition for rehearing was overruled on April 11, 1960, and notice of appeal was filed in that Court on May 27, 1960. The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U. S. C. § 1257(2). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case. **Kingsley Books, Inc., v. Brown**, 343 U. S. 326; **Near v. State of Minnesota**, 283 U. S. 697; **Flournoy v. Wiener**, 321 U. S. 253, 261.

STATUTES INVOLVED.

Sections 542.380, 542.390, 542.400, 542.410, and 542.420 R. S. Mo., 1949, and Rule 33 of the Rules of the Supreme Court of Missouri, are set forth in the Appendix B, infra pp. 39-42.

QUESTIONS PRESENTED.

(1) Whether proceedings under Missouri statutes, §§ 542.380-542.420 R. S. Mo., 1949, and Rule 33 of the Missouri Supreme Court Rules preventing dissemination and distribution of publications alleged to be obscene (but not yet found to be offensive by any Court), (a) by providing for their ex parte seizure before a trial or hearing is held for determining if their character warrants condemnation and (b) by permitting the general seizure by police officers and deputy sheriffs from retail and wholesale magazine and news vendors of property specified merely as of an obscene character, authorize a censorship and previous restraint of publications in violation of the constitutional rights of freedom of speech and press under Amendment One of the United States Constitution as made applicable to the states by Amendment Fourteen of the United States Constitution.

(2) Whether the determination of the issue of obscenity by a trial judge applying unconstitutional tests and standards of obscenity and a review by an appellate court refusing to set aside the trial judge's judgment on the issue of obscenity because it was not "clearly erroneous" impaired appellants' right of freedom of speech and press under Amendment One as incorporated in the due process and privileges and immunities clauses of Amendment Fourteen of the United States Constitution.[1]

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[1] A third question in this case is as follows: (3) Whether the publications seized are obscene under the standard set forth in *Roth v. United States*, and *Alberts v. California*, 354 U. S. 476, and whether the finding that the publications are obscene violated appellants' freedom of speech and press under Amendment One of the United States Constitution, as incorporated in the due process and privileges and immunities clauses of Amendment Fourteen of the United States Constitution. Although appellants believe these publications are not obscene, this question is not being pressed because of the practical difficulties involved in examining 100 separate publications.

STATEMENT.

Sections 542.380-542.420, R. S. Mo. 1949, provide for the seizure of publications alleged to be obscene and authorize their destruction if they are in fact found to be obscene. Section 542.380 provides that upon a verified complaint a search warrant may be issued to a sheriff directing him to search and seize obscene books and publications which are kept for the purpose of distribution or circulation. Section 542.400, R. S. Mo. 1949, requires a hearing within five to twenty days after the search and seizure for determining the character of the property seized and commands that the officer in charge of the seized property "retain possession of the same until after such hearing." Subsequent to the seizure of the publications, the statute also requires notice of the seizure and a hearing opportunity to claimants. If the publications are found to be obscene after hearing, the statute authorizes their destruction. Rule 33 of the Rules of the Missouri Supreme Court deals with the procedural aspects of searches and seizures of personal property when authorized by statute.[2]

Acting under the above statutes, search warrants were obtained on October 10, 1957, from the Circuit Court of Jackson County, Missouri, by an officer of the Police Department of Kansas City. One warrant was directed against the premises of a business wholesaling newspapers, books and magazines, the remaining five warrants were for premises on which were conducted displays and sales of such publications at retail (R. 3-4). The warrants were issued after complaints were filed by the police officer alleging that on October 8, 1957, at the premises of the

[2] This rule was drafted and promulgated pursuant to authority granted the Court by Section 5 of Article V of the Constitution of 1945 of the State of Missouri which allows that Court to establish rules of practice and procedure for all Courts provided they do not change substantive rights.

respective appellants certain persons kept property described as "obscene books, papers, drawings, lithographs, engravings, pictures, prints and other articles or publications of an indecent, immoral and scandalous character" for the purpose of selling, publishing, exhibiting, or otherwise distributing it (R. 3). No publication was either specifically mentioned in the complaint nor displayed to the Court before the warrants were issued (R. 53-54). Upon these complaints the Circuit Court issued its search warrants authorizing the search of appellants' premises and the seizure of "said above-described property or any part thereof" and ordering that the property so seized be returned to the Court to be dealt with in accordance with law (R. 4-5).

The search warrants were executed on the issuing day and returns were filed in Court, together with an inventory of the 13,308 publications seized. A copy of the inventory was left with the person in charge of the premises when the seizure was made. Notices were served upon the interested parties of a hearing to be held in the Circuit Court to determine whether the publications seized constituted obscene, lewd, licentious, indecent, or lascivious material within the meaning of Section 542.380, R. S. Mo. 1949, and whether it was subject to destruction (R. 6-19A). Thereafter, appellants filed separate motions for the immediate return of the property seized and to quash the search warrants (R. 43-44, 20-28, 2-3).[3] These motions alleged, inter alia, that Section 542.380 and Section 542.400, R. S. Mo. 1949, and Rule 33 of the Missouri Supreme Court Rules, were unconstitutional for the reason that they per-

[3] Appellants, prior to the hearing filed original and supplemental motions to quash the search warrants and for the immediate return of the seized property (R. 43-44). Subsequent to the hearing, amended motions to quash the search warrants and for the immediate return of the seized property were filed (R. 20-28, 2-3).

mitted a search and seizure of publications ex parte without notice or hearing "prior to seizure" and thus constitute "a prior restraint or censorship of said publication," impairing appellants' freedom of speech and publication in violation of Amendment 1 of the United States Constitution, thereby depriving appellants of their privileges and immunities and of their property without due process in violation of Amendment 14 of the United States Constitution (R. 21-22). Similar constitutional objections were made to the application of the statute and rule to the instant cases and to the issuance of the search warrants (R. 22-25). The motions also alleged that the warrants were illegally issued because the complaints and the warrants did not describe the personal property to be searched for and seized in sufficient detail to enable the person serving the warrant to readily identify the same and that they did not describe the things to be seized as nearly as may be (R. 23-24).

At a hearing held pursuant to the notice given a Kansas City police officer assigned to its Vice Squad testified he had made an investigation of the five retail news stands involved, purchased five openly displayed magazines and then later signed the complaints for the search warrants (R. 49-50). He displayed no magazines to the Court prior to the issuance of the warrants, made no specific mention of any magazine in his complaints, and presented no evidence to the court (R. 53-55, 57). The parties from whom the property was seized were not notified that a complaint would be filed, and were not given an opportunity to be heard prior to the seizure (R. 55, 57). At each of the five retail newsstands, a police officer supervised the search and seizure of the property involved, made a personal selection and determination of which publications to seize and seized all publications which he decided were subject to seizure (R. 59-60, 64-66). At the wholesale distributor, the officers who searched had a list of

magazines to be seized prepared by the Police Department and further seized anything else which in their judgment merited seizure (R. 55, 68-70). The wholesaler had on hand hundreds of thousands of copies of periodicals (R. 70). The items seized were held for purposes of circulation (R. 72-76).

By its judgment on December 12, 1957, the trial Court overruled the motions to quash the search warrant and found that 100 of the 280 different publications were in violation of the obscenity statute, Section 542.380 (R. 114-128). In reaching this conclusion the trial judge applied the test of "whether the article in question tends to deprave and corrupt the morals by inciting lascivious thoughts or arousing the lustful desire of those whose minds are open to such influences and into whose hands such publications may fall". The trial judge also held that these publications should be retained by the sheriff as necessary evidence for the purpose of possible criminal prosecution and that then they should be destroyed (Appendix A, p. 33). No criminal prosecution was ever instituted. The remaining 180 publications and all copies thereof were ordered to be returned to their respective claimants. The publications found to be obscene included the following: Magazines designed to promote the cause of nudism (Exhibits 39, 60, 64, 102, 244); photography magazines containing articles and texts designed to assist photographers in taking photographs which contained some pictures of women with breasts or buttocks exposed (Exhibits 21, 29, 37, 47, 51, 52, 63, 77, 94, 95, 195, 209, 210, 215, 217, 226, 227, 233, 247); magazines containing texts and articles on a variety of subjects which contained some photographs of women with breasts or buttocks exposed (Exhibits 3, 4, 23, 26, 28, 30, 55, 57, 59, 61, 74, 121, 234); magazines containing articles on a variety of subjects designed for circulation among Negroes (Exhibit 7); magazines containing texts and articles by Grovanno Boccaccio

and Guy de Maupassant (Exhibits 22, 45), two books containing cartoons and jokes similar to those found in nationally known and circulated magazines (Exhibits 257, 271) and a book containing information and advice regarding the physical, psychological and emotional aspects of marriage (Exhibit 264).[4]

Appellants filed a timely motion for a new trial which realleged the constitutional violations set forth in their pretrial motions (R. 129-138). Objection was further made that the standard applied by the trial Court in its determination of the obscene was "unconstitutional under **Roth v. United States** and **Alberts v. California**, 354 U. S. 476, **Butler v. Michigan**, 352 U. S. 380," impairing appellants' "right of freedom of speech and press" in violation of "the free speech clause of Amendment 1 of the United States Constitution and the due process and privilege and immunities clause of Amendment 14 of the United States Constitution" (R. 129-130). This motion was not passed on by the Court within the 90 days after its filing and was thereby deemed denied by Missouri statute on March 23, 1958. Appellants then filed timely notices of appeal to the Supreme Court of Missouri (R. 138-144). On July 13, 1959, Division 2 of the Supreme Court of Missouri entered a decision affirming the judgment of the trial Court (R. 148-160). A timely motion to transfer the case to the Court en banc was filed and on September 14, 1959, the cases were transferred to the Supreme Court of Missouri en banc (R. 161).

The Missouri Supreme Court noted that "constitutional questions have been timely and properly preserved." It

[4] These publications are not obscene under the standard set forth in *Roth v. United States* and *Alberts v. California*, 354 U. S. 476. See *Sunshine Book Co. v. Summerfield*, 355 U. S. 372, reversing D. C. Cir., 249 F. 2d 114 and 128 F. Supp. 564; *One, Inc., v. Olesen*, 355 U. S. 371, reversing 9 Cir., 241 F. 2d 772; *Times Film Corporation v. Chicago*, 355 U. S. 35, reversing 7 Cir., 244 F. 2d 432.

summarized appellants' contention relative to the invalidity of the Missouri statute and rule as follows (Appendix A, p. 21):

> "The appellants charge that these statutes and the court rule are violative of their constitutional rights of freedom of speech and press guaranteed by Art. I, Sec. 8, Constitution of Missouri 1945, and Amendment I of the United States Constitution as made applicable by the privileges and immunities and due process clauses of the Fourteenth Amendment of the United States Constitution, and guaranteed by the provisions of Art. I, Sec. 15, of the Missouri Constitution protecting them against unreasonable search and seizures. They say that the seizure without notice and an opportunity to be heard prior to seizure constitutes a prior restraint or censorship of the publications and allows the police officers and deputy sheriffs to make a judicial determination after the warrant was issued as to which of the appellants' periodicals and magazines were violative of the obscenity statutes and therefore subject to seizure. The appellants assert that freedom of speech and press occupy a preferred position among our constitutional guarantees, Murdock v. Commonwealth of Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, and that there is a distinction between a restraint imposed before circulation of a publication and a penalty imposed by reason of its circulation and that prior restraints can be justified only in most 'exceptional cases,' citing Near v. State of Minnesota ex rel. Olson, 283 U. S. 697-716, 51 S. Ct. 625-631, L. Ed. 1357."

The Missouri Supreme Court affirmed (Appendix A, p. 23), holding that "all of the constitutional questions here presented have been resolved adversely to the appellants' contention by **Kingsley Books, Inc., v. Brown,** 354 U. S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469," concluding:

"The differences in the Missouri and New York statutes are in degree and not of kind. The New York statute provides for a hearing within one day after seizure and a decision within two days after hearing; the Missouri statute provides that the hearing shall be not less than five nor more than twenty days after the seizure. This provision may redound to the benefit of the owners of the publications in preparing their cases for trial. There is no complaint in this case that the appellants sought or desired an earlier hearing and it was refused. It has not been demonstrated that the difference in time of hearing is unreasonable. While publications are seized under the Missouri statute, no temporary injunction is issued as under the New York law. The dealers may continue to sell under the Missouri act if they have or can obtain the publications and desire to do so. The contention that the statutes and the Court rule are unconstitutional in the respects asserted is denied."

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

1. The constitutional limits of prior restraints on publications are substantial questions involved in this appeal. In **Kingsley Books, Inc. v. Brown**, 354 U. S. 326, this Court upheld a limited injunctive remedy against a particular publication under a New York statute which provided "closely defined procedural safeguards against the sale and distribution of written and printed matter found after due trial to be obscene." The New York statute "studiously withholds restraint upon matters not already published and not yet found to be offensive" and permitted the seizure of the printed matter, if found to be obscene, subsequent to trial only. The Missouri statute goes much further. It permits the seizure of publications prior to any determination that they are in fact obscene. In New York a distributor is not restrained from circulating his

publications before a determination that they are offensive, if he chooses to risk punishment for contempt or for violating the criminal laws. Missouri provides no such option. All the copies of a particular publication in a distributor's possession are seized by the police prior to any hearing. The distributor may circulate the publication only if he is financially and otherwise able to secure additional copies. But these also may be summarily seized.

Moreover, the Missouri statute does not confine the seizure to a particularly described publication or to a publication displayed to a court prior to the seizure. It does not narrowly limit what may be seized to a specific publication or to a specific class of publication. Rather it authorizes the seizure of all publications at a certain address which the police officer or sheriff executing the warrants finds fits the general description of "obscene, lewd, licentious * * * books, pamphlets, papers, and other articles of an indecent, immoral and scandalous character".

The object of the statute is "to protect the public from character contamination" by preventing the dissemination of obscenity (Appendix A, p. 23).

The effect of the Missouri provisions is that a state, ex parte, prior to any hearing in order to determine the nature of the publications which a distributor possesses, may obtain possession of his publications and retain these publications until after a hearing determining the obscenity issue.[5] The result is a limitation upon circulation prior to dissemination to the public. When the publications are seized the material contained therein must be reviewed and approved prior to distribution. A distributor of publications should have the right to circulate his material subject to any criminal or contempt sanction if the matter offends any laws governing obscenity.

[5] Such a seizure, applied to a newspaper, would destroy the value of any news items of current significance.

In determining the constitutionality of the procedure authorized by Sections 542.380 and 542.400, R. S. Mo. 1949, the Missouri Supreme Court has misconstrued **Kingsley Books, Inc. v. Brown**, 354 U. S. 436, by finding "all of the constitutional questions here presented have been resolved adversely to appellants' contentions" in **Kingsley** and that the "difference in the Missouri and New York statutes are in degree and not of kind" (Appendix A, p. 24).

We believe that the Missouri procedure and the procedure upheld in **Kingsley** are vastly different in kind and that the distinction between them points out the basic unconstitutionality of the Missouri statute and court rule.

In **Kingsley**, after the complaint was issued, the petitioners were ordered to show cause within four days why they should not be enjoined pendente lite from distributing the books. Petitioners then consented to the granting of an injunction pendente lite. This court was careful to point out in that case that the issue was whether the chief executive of a municipality could institute a suit for an injunction to prevent the distribution of publications "under closely defined procedural safeguards," and to obtain an order for their seizure, in default of surrender, of the publications if after the trial the publications were found to be obscene. Until a publication is declared obscene by a New York Court, the owner of a publication in New York may keep the periodical and sell it on his own judgment and at his own risk. The material alleged to be obscene may not be seized before a hearing for the determination of the obscenity issue. This is the vast difference between the procedure approved in **Kingsley** and that approved by the Missouri Supreme Court. In Missouri police officers are permitted to seize publications prior to any hearing or judicial determination that the seized items are obscene. The owner of the property is not given any choice as to whether he will continue to circulate the material or withdraw it. Rather the circulation is summarily

curtailed by police officers without notice or an opportunity to be heard and prior to any judicial determination as to the character of the material. Thus, the number of days between the institution of the proceeding in New York and the hearing (without an intervening seizure) is in no sense material in comparing that statute with the number of days provided in Missouri after seizure and the subsequent court hearing. There is a curtailment in circulation in Missouri prior to any judicial determination of the character of the publication. The administrative censor is allowed to curtail circulation prior to approval. The number of days so intervening is meaningless because the unilateral seizure has already been accomplished.

Even if a seizure of alleged obscene publications prior to a hearing would be permissible, the clean sweep seizure authorized by this statute would violate the constitutional guaranties of free speech and press. The description in the warrants of the matters to be seized as merely "obscene, lewd, licentious * * * books, pamphlets, papers, and other articles or publications of an indecent, immoral and scandalous character" gave too much authority to the executing officers. Police or any other executive censor should not be allowed to seize all material from a magazine or book seller which they determine falls within a general warrant allowing the seizure of all obscene material. Especially is this so when the magazines or books have been openly displayed for sale and may be described by name, volume or issue. The approval of such a procedure will only restrict the circulation of all writings. The whim and taste of every minor official should not be the basis for the curtailment of a publication. This procedure will certainly lead to a restriction of the communication of ideas of all kind and nature.

The application of the constitutional test of obscenity is a task of great magnitude. The determination of whether a book, as a whole, has "a substantial tendency to deprave

or corrupt its readers by inciting lascivious thoughts arousing lustful desires," or whether a book is "calculated" to corrupt or debauch, or whether "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." **Roth v. United States and Alberts v. California**, 354 U. S. 476, 486, 489, 495, is a perplexing and baffling problem sometimes unsolved until the court of last resort has spoken. Sex and the portrayal of sex is not synonymous with obscenity but only material dealing with sex in a manner appealing to prurient interests is obscene. 354 U. S. at 487. Furthermore, obscenity cannot be determined solely from the nature of the material but the question of customary freedom of expression has to be considered. A publication must be tested by contemporary community standards. And obscenity is not as "distinct, recognizable, and classifiable as poison ivy."

Moreover it is unreasonable to attempt to place statutes dealing with alleged obscene publications on the same footing as statutes directed generally against gambling and intoxicating liquor. The constitutional guaranties of freedom of speech and of the press stand in the way of allowing publications to be seized in like manner. And there is no specific constitutional inhibition applicable to gambling equipment or intoxicating liquor. Yet the conclusion of the court below was that books, pamphlets, magazines and all writings can be regulated by a State like gambling equipment and intoxicating liquor. Indeed, the Court states in regard to obscenity that, "Its dissemination should be prevented just as certainly as the spread of disease germs should be curbed among the members of the community. The Courts have never hesitated to enjoin potential menaces to public health or to approve the vaccination or innoculation of school children and others when reasonably required. Obviously, a State government does not have to permit the home of its

citizens to be destroyed by fire when the arson can be reasonably prevented * * *" (Appendix A, p. 23). This ignores the admonition of Mr. Justice Douglas in **Kingsley Books, Inc. v. Brown**, 354 U. S. 436, 447, that "Free speech is not to be regulated like diseased cattle and impure butter."

The reasoning of **Smith v. California**, 361 U. S. 147, supports the contentions here urged. This court, while recognizing that a state may eliminate scienter in other areas of its criminal law such as in its intoxicating liquor or food and drugs statutes, held that it could not be eliminated in an ordinance making possession of an obscene book unlawful. The First Amendment free speech provision prohibited such a restriction. Similarly, the regulation of intoxicating liquor and food and drugs permit summary seizure. But where the First Amendment is involved such summary procedure may not be constitutionally authorized.

Nor can a statute or rule which in operation and effect substantially eliminates or tends to diminish the flow of free expression be justified by recourse to the label of police powers.[6]

In this appeal the validity of the cited Missouri statutes under the free speech and press provisions of the federal constitution were raised in the courts below. The ruling of the Missouri Supreme Court was that the statutes were not repugnant to the constitution. Accordingly, this court has jurisdiction to hear this case under the provisions of 28 U. S. C. 1257 (2).

2. The opinion of the trial judge shows that he applied unconstitutional tests of obscenity. He applied the test of whether the publication might incite lascivious

[6] *Thornhill v. Alabama*, 310 U. S. 88; *Bridges v. California*, 314 U. S. 252; *Laxton v. Steele*, 152 U. S. 133, 137.

thoughts "of those whose minds are open to such influences and into those hands such a publication may fall" and whether the publications "would arouse lewd or lascivious thoughts in the susceptible, Appendix A, pp. 37-38. The trial judge disregarded the "dominant theme of the material." **Roth v. United States**, 354 U. S. 476, 489. No finding was made that the predominant appeal of the publications considered as a whole was to prurient interests, or that the book had a substantial tendency to corrupt or deprave the average person. 354 U. S. at 487. On the contrary the explicit view of the trial Court was that the book would tend to deprave those who were susceptible. The trial Court also did not apply contemporary community standards as a test for obscenity, 354 U. S. at 489, and excluded from consideration whether each publication "goes substantially beyond customary limits of candor, description or representation", 354 U. S. at 487, fn. 20.

On review, the appellate court never met the issue as to whether the publications were obscene under the constitutional test. On the one hand, it held that it was not bound by the trial judge's opinion and, on the other hand, it concluded that the judgment of the lower Court was not "clearly erroneous." As a result, the Missouri Supreme Court did not squarely meet the issue as to whether the test applied to the publications was a proper one in view of **Roth v. United States** and **Alberts v. California**, 354 U. S. 476. The result of the trial and appellate courts' opinions is that the correct test of obscenity is never applied to the publications in this case. To hold that the appellate court is not bound by such findings and conclusions, and that the trial judge's decision is not clearly erroneous does not constitute a review of the alleged obscenity of the material in question by a proper standard, as set out in **Roth v. United States**, 354 U. S. 476, and thereby impairs appellants' freedom of speech.

The decision of the Supreme Court of Missouri failed to apply properly the free speech and press guaranties of the First and Fourteenth Amendments. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX A.

Opinions.

In the Supreme Court of Missouri
En Banc.

In Re: Search Warrant of Property at 5 West 12th Street, Kansas City, Missouri, v. William Marcus and Title News Company.	No. 46,900
In Re: Search Warrant of Property at 3105 Euclid, Kansas City, Missouri, v. Jack K. Rayburn and Ted's News Shop.	No. 46,901
In Re: Search Warrant of Property at 1 East 39th Street, Kansas City, Missouri, v. Harvey Hammer and Town Book Store.	No. 46,902
In Re: Search Warrant of Property at 123 East 12th Street, Kansas City, Missouri, v. Harvey Hammer and Ruback's News Stand.	No. 46,903

In Re: Search Warrant of Property at 104 East 10th Street, Kansas City, Missouri, v. Homer Smay and Kansas City News Distributors.	No. 46,904
In Re: Search Warrant of Property at 221 East 12th Street, Kansas City, Missouri, v. Jack Gordon.	No. 46,905

Appeal From the Circuit Court
of Jackson County,
Honorable Ben Terte, Judge.

These appeals are from proceedings under §§ 542.380-542.420 which provide for the seizure of publications alleged to be obscene and authorize their destruction if, after a hearing, they are in fact found to be obscene. Six search warrants were obtained on October 10, 1957, from the Circuit Court of Jackson County by an officer of the Police Department of Kansas City. One of them was directed against the premises of a business wholesaling newspapers, books and magazines; the remaining five warrants were for premises on which were conducted displays and sales of such publications at retail.

The search warrants were executed on the same day and the returns were filed in court together with an inventory of the publications seized. A copy of the inventory was left with the persons in charge of the premises where the seizure was made. Notices were served upon the interested parties of a hearing to be held in the circuit court to determine whether the property seized constituted ob-

scene, lewd, licentious, indecent, or lascivious material within the meaning of § 542.380 and whether it was subject to destruction pursuant to § 542.420. The claimants of the publications seized filed separate motions for the immediate return of the property seized and to quash the search warrant and a hearing of all issues was had before the trial court sitting without a jury.

By its judgment the trial court overruled the motions to quash the search warrants and found that 100 of the 280 publications in evidence were in violation of the Obscenity Statute, § 542.380. The remaining 180 publications and all copies thereof were ordered to be returned to the claimants. After unavailing motions for new trials, the claimants appealed. The appeals all present the same questions and have been consolidated.

This court has appellate jurisdiction because constitutional questions have been timely and properly presented. Art. V, Sec. 3, Constitution of Missouri 1945; State v. Becker, 364 Mo. 1079, 272 S. W. 2d 283.

Section 542.380 deals with the means of determining whether certain property, including publications alleged to be obscene, are of the kind prohibited by law and, insofar as here material, provides that upon a verified complaint a search warrant may be issued to a sheriff or any constable of the county directing him to search for and seize: "(2) Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz.: obscene, lewd, licentious, indecent or lascivious books, pamphlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letters, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly

or indirectly, when, where, how or of whom any of such things can be obtained; * * *."

Section 542.400 provides that the judicial officer issuing the warrant shall set a day not less than five nor more than twenty days after the date of service and seizure, "for determining whether such property is the kind of property mentioned in section 542.380, and shall order the officer having such property in charge to retain possession of the same until after such hearing." The section further provides for posting a written notice of the hearing on the premises where the property was seized and for delivering a copy of such notice to any person claiming an interest in such property. Section 542.420 authorizes the destruction of the property or articles if they are found to be of the kind mentioned in § 542.380 (2).

Supreme Court Rule 33 and particularly 33.01, dealing with procedural aspects of searches and seizures, provides, inter alia, for the seizure of personal property where authorized by statute if the verified complaint filed with the judge or magistrate states facts positively and not upon information and belief.

The appellants charge that these statutes and the court rule are violative of their constitutional rights of freedom of speech and press guaranteed by Art. I, Sec. 8, Constitution of Missouri, 1945, and Amendment I of the United States Constitution as made applicable by the privileges and immunities and due process clauses of the Fourteenth Amendment of the United States Constitution, and guaranteed by the provisions of Art. I, Sec. 15 of the Missouri Constitution protecting them against unreasonable search and seizures. They say that the seizure without notice and an opportunity to be heard prior to seizure constitutes a prior restraint or censorship of the publications and allows the police officers and deputy sheriffs

to make a judicial determination after the warrant was issued as to which of the appellants' periodicals and magazines were violative of the obscenity statutes and therefore subject to seizure. The appellants assert that freedom of speech and press occupy a preferred position among our constitutional guarantees, Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, and that there is a distinction between a restraint imposed before circulation of a publication and a penalty imposed by reason of its circulation and that prior restraints can be justified only in most "exceptional cases," citing Near v. Minnesota ex rel. Olson, 283 U. S. 697-716, 51 S. Ct. 625-631, 75 L. Ed 1357.

Conceding this much to be true, it must also be recognized as stated in Near v. Minnesota, supra, that "the authority of the state to enact laws to promote the health, safety, morals, and general welfare of its people is necessarily admitted", 51 S. Ct. 628; that "the protection even as to previous restraint is not absolutely unlimited", and that "the primary requirements of decency may be enforced against obscene publications." 51 S. Ct. 631. Also, in Roth v. United States, 354 U. S. 476, 485, 77 S. Ct. 1304, 1309, the Supreme Court held "that obscenity is not within the area of constitutionally protected speech or press." In State v. Becker, 364 Mo. 1079, 272 S. W. 2d 283, 288-9, this court held: "It has been long held that the right of freedom of speech is subject to the state's right to exercise its inherent police power. The right of free speech is not an absolute right at all times and under all circumstances." The constitutionality of the penal obscenity statute, § 563.280, was attacked in the Becker case and it was held, inter alia, not to impair the constitutional guarantees of freedom of speech and press.

We cannot accept the appellants' contention that: "The possessor of publications should have the right to circu-

late his material subject to any criminal or other sanctions if the matter offends any governing obscenity such as Section 563.280, R. S. Mo. 1949."[1] Relegating the state to punishment of the fait accompli would overlook and neglect entirely government's right and duty to protect the public from character contamination and its unfortunate consequences. If obscenity is as destructive and weakening to the moral fiber as the federal and state governments have always considered it, then its dissemination should be prevented just as certainly as the spread of disease germs should be curbed among the members of a community. The courts have never hesitated to enjoin potential menaces to public health or to approve the vaccination or innoculation of school children and others when reasonably required. Obviously, a state government does not have to permit the homes of its citizens to be destroyed by fire when the arson can be reasonably prevented. The contention stated has been decided adversely to the appellants in the Becker case, supra, as well as the Kingsley case which we shall now consider.

All of the constitutional questions here presented have been resolved adversely to the appellants' contention by Kingsley Books, Inc., v. Brown, 354 U. S. 436, 77 S. Ct. 1325; 1 L. Ed. 2d 1469. This was a proceeding under the New York statute which is similar to that of Missouri. The New York act provided that upon a complaint being filed the issuance of a temporary injunction against the circulation of publications alleged to be obscene was au-

[1] Section 563.280, insofar as here pertinent, provides: "Every person who shall manufacture, print, publish, buy, sell, offer for sale, or advertise for sale, or have in his possession, with intent to sell or circulate, or shall give away, distribute or circulate any obscene, lewd, licentious, indecent or lascivious book, pamphlet, paper, ballad, drawing, lithograph, engraving, picture, photograph, model, cast, print, article or other publication of indecent, immoral or scandalous character, * * * shall, on conviction thereof, be fined not more than one thousand dollars nor less than fifty dollars or be imprisoned not more than one year in the county jail, or both; * * *."

thorized. If the court found the material to be obscene, a permanent injunction against its distribution could be issued and an order made for the destruction of the material. The Supreme Court of the United States held that the New York statute was not unconstitutional. It was held, 77 S. Ct. 1328 (6), that the Fourteenth Amendment did not restrict the states to the use of criminal processes in seeking to protect its people of dissemination of pornography. The New York statute was held not to amount to prior censorship of literary products and not to violate the freedom of thought and speech protected by the Fourteenth Amendment.

The differences in the Missouri and New York statutes are in degree and not of kind. The New York statute provides for a hearing within one day after seizure and a decision within two days after hearing; the Missouri statute provides that the hearing shall be not less than five nor more than twenty days after the seizure. This provision may redound to the benefit of the owners of the publications in preparing their cases for trial. There is no complaint in this case that the appellants sought or desired an earlier hearing and it was refused. It has not been demonstrated that the difference in time of hearing is unreasonable. While publications are seized under the Missouri statute, no temporary injunction is issued as under the New York law. The dealers may continue to sell under the Missouri act if they have or can obtain the publications and desire to do so. The contention that the statutes and the Court rule are unconstitutional in the respects asserted is denied.

Apart from the judgment formally entered, the trial court filed in the office of the clerk of the circuit court a memorandum entitled "Opinion" in which the court, inter alia, set out the applicable statutes and, in connection with the test for determining whether the publications

were obscene, lewd, lascivious, licentious, indecent and of an immoral character, cited and quoted from State v. Mac Sales Company, Mo. App., 263 S. W. 2d 860, 863, State v. Pfenninger, 76 Mo. App. 313, 317, and State v. Becker, 346 Mo. 1079, 272 S. W. 2d 283, 287. The appellants assert that the trial court applied the tests and standards of obscenity stated in those cases and that such tests and standards are violative of their rights of freedom of speech and press under the federal and state constitutions by virtue of the standards adopted by the Supreme Court of the United States in Roth v. United States and Alberts v. California, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 1498, and Butler v. Michigan, 352 U. S. 380, 77 S. Ct. 524, 1 L. Ed. 2d 412. It should be noted that the trial court's opinion states and **the judgment holds** that the 100 exhibits listed were obscene, lewd, licentious, lascivious, indecent and of an immoral and scandalous character "within the meaning and intent of **Missouri Revised Statutes, 1949, Section 542.380.**"

The appellants are mistaken in their view of the holding of the Becker case which is controlling and the only one we need to discuss. They say the standard adopted was the effect of isolated portions of the publication upon particularly susceptible persons which has been construed to be the rule announced in Regina v. Hicklin, 1868, L. R. 3 Q. B. 360, one of the authorities discussed in Becker. Regardless of the present validity of the Hicklin rule, that was not the standard applied in the Becker case. In announcing the mode of determination the court stated, 272 S. W. 2d 286: "These questions have been considered and tested objectively as to the effect of these publications in their entirety upon persons of average human instincts." In this interpretation of Becker, this court is fortified by the opinion of the Supreme Court of the United States. In the Roth and Alberts case, the Becker case is listed as one of the decisions which has rejected

the Hicklin test and substituted this standard: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S. 489, marginal note 26. Appellants' claim of error is denied.

Moreover, appellate review in a nonjury case is upon both the law and the evidence, as in actions of an equitable nature, and a trial court's memorandum or written opinion is not binding and preclusive even if deemed a statement of grounds of decision. Grapette Co. v. Grapette Bottling Co., Mo. App., 286 S. W. 2d 34, 36; Fort Osage Drainage District of Jackson County v. Jackson County, Mo., 275 S. W. 2d 326, 328; Hammond v. Crown Coach Co., 364 Mo. 508, 263 S. W. 2d 362, 366; Hilmer v. Decher, Mo. App., 183 S. W. 2d 321, 326; § 510.310-2.

The appellants next contend that the complaints and the search warrants based thereon violated the search and seizure provisions of the Missouri Constitution, Art. I, Sec. 15, and Supreme Court Rule 33.01 (b) in that (1) they did not describe the publications "to be searched for and seized in sufficient detail, and in particularity, to enable the person serving the warrant to readily ascertain and identify the same" and (2) the warrants were issued without a sufficient showing of probable cause. Both the complaints and the search warrants described the publications in the language of the statute, § 542.380 (2). The constitution protects against "unreasonable searches and seizures" and provides that no search warrant "shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause * * *." Rule 33.01 (b) provides that the search warrant must describe the place and property "in sufficient detail and particularity to enable the officer serving the warrant to readily ascertain and identify the same."

It is **unreasonable** searches and seizures that are prohibited by the constitution, so the determination must be whether the description of the publications was reasonably definite and particular considering the nature and character of the property involved. The proceedings under these statutes are essentially proceedings in rem having for their purpose the seizure and destruction of obscene material, gambling equipment and devices and the other prohibited property mentioned in § 542.380. The general rule distinguishing the particularization of property description required in this class of cases is well stated in 79 C. J. S. 861, Searches and Seizures, § 73f, as follows: "**Specific property; property of specified character.** Where the purpose of the search is to find specific property, it should be so particularly described as to preclude the possibility of seizing any other; but, if the purpose is to seize, not specified property, but property of a specified character, which, by reason of its character and of the place where, and the circumstances under which, it may be found, if found at all, would be illicit, a description would be unnecessary and, ordinarily, impossible, except as to such character, place and circumstances."

In 47 Am. Jur. 524, Searches and Seizures, § 37, there is this further statement: "A description of the property to be seized need not be technically accurate nor necessarily precise; and its nature will necessarily vary according to whether the identity of the property, or its character, is the matter of concern. Further, the description is required to be specific only so far as the circumstances will ordinarily allow. Thus, under a statute authorizing searches for gaming apparatus or implements, it is not sufficient to describe the property as goods, wares, and merchandise, or as chattels generally; but a search warrant commanding the seizure of 'gambling implements and apparatus used, kept, and provided to be used in unlawful gambling' on certain premises and in a certain building,

is sufficiently definite. So, in the case of warrants to search for smuggled goods or for lottery tickets, a general description is deemed sufficient."

In State v. Cook, 322 Mo. 1203, 18 S. W. 2d 58, a search warrant requiring the officers to seize "all intoxicating liquors" found on the premises was held sufficiently definite and not to deprive the defendant of his "right to a trial by jury on the issue of the intoxicating character of the liquor seized." In North v. State, 159 Fla. 854, 32 So. 2d 915, a warrant describing the property as "gambling implements and devices used for the purpose of gaming and gambling" was held sufficient. In Cagle v. State, 147 Tex. Cr. 354, 180 S. W. 2d 928, a warrant describing the property as implements being kept for: "The establishment and operation of a lottery, and the keeping and exhibiting of a policy game" was held sufficient to justify the seizure of a variety of things used in conducting a policy game. In Frost v. People, 193 Ill. 635, 61 N. E. 1054, a warrant describing the property as "gaming instruments and apparatus" was held sufficient.

In the circumstances of this case we hold the search and seizure was not unreasonable for lack of a sufficient description of the property to be seized.

With respect to probable cause, the separate complaints or applications for the search warrants, which were sworn to by a lieutenant of the Kansas City Police Department, were presented to the Circuit Court by the police lieutenant and an assistant prosecutor of Jackson County. The complainant swore to the facts "of his own knowledge" and the court made a finding that there was probable cause to believe the allegations of the complaint to be true and that there was probable cause for the issuance of the search warrants. Supreme Court Rule 33.01 further defines the statutory procedure and provides that the judicial officer shall issue the warrant if the complaint is veri-

fied and supported by affidavits "stating evidential facts from which such judge or magistrate determines the existence of probable cause", but it also authorizes the issuance of the warrant if complaint states the facts "positively and not upon information and belief" as was done in this case. We deem the factual allegations sufficient to support the finding of probable cause and the assignment of error is denied.

The search warrants were directed "to any peace officer in the state of Missouri." The appellants assert that this was improper and violative of their rights under Art. I, Sec. 15, of the Missouri Constitution and Supreme Court Rule 33.01 in that the warrants were not directed to a particular peace officer or officers by name. The constitution does not specify to whom a search warrant shall be addressed and § 542.380 provides that the judicial officer shall issue the warrant "to the sheriff or any constable of the county." Rule 33.01 provides the judge or magistrate shall issue the search warrant "directed to any peace officer." Rule 33.02 provides: "Every such search warrant shall be executed by a peace officer and not by any other person." Section 542.290 provides: "Every such [search] warrant shall be executed by a public officer, and not by any other person."

In this regard the appellants rely upon United States v. Kohlman, 51 F. 2d 313, which involved a federal search warrant in a prohibition case. It was held that a search warrant should be directed to a person or persons by name and not to a class and that it could only be executed in accordance with Title 11, Sec. 7, of the Espionage Act which provided that a federal search warrant may be served "by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requiring it." 40 Stat. 229. Obviously, neither the statute nor the decision is controlling in this matter of state law.

The appellants make no contention that the warrants were served by any one without authority, but simply that the warrant was "improper on its face." The record shows the warrants were executed by deputy sheriffs of Jackson County, together with officers of the Kansas City Police Department. We find no merit in appellants' contention and it is denied.

The appellants' remaining assignment is that the trial court erred in finding that the publications in question are obscene, lewd, licentious, indecent, lascivious, immoral and scandalous within the meaning and intent of § 542.380. As we have previously pointed out the Missouri rule as applied in the Becker case is in accord with the standard approved by the Supreme Court of the United States in the Roth and Alberts case, which is: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S. 489. We have also held that the trial court's opinion or memorandum cannot be used to contradict the judgment formally entered even if it were inconsistent with the judgment; however, we do not so construe it.

It is impossible to adequately describe these exhibits and quite unnecessary. It is sufficient to say of them generally that they consist of pictures of young women, naked or nearly so, in suggestive and provocative poses with emphasis on bust development and lustful entreaty. The legends accompanying the pictures and other printed material add to the prurient interest created. It is stated on some of the publications that they are for artists and photographers or for some legitimate purpose and restricted use. However, the dominant character of the publications and the place and manner in which they were exposed for sale belie this thin disguise. Generally, the technical information on picture taking in these publica-

tions is less than that found on the leaflet in a roll of new film or in the pamphlet that accompanies the purchase of a modest camera. No one can seriously contend that any great work of art, literature, ideas or information will be lost to the world if these publications are not disseminated.

Our review of the evidence in cases tried upon the facts without a jury is "as in suits of an equitable nature" and the "judgment shall not be set aside unless clearly erroneous." Section 510.310-4. We have examined the exhibits and applied the tests approved in the Becker and Roth cases. While opinions may vary with regard to the proper classification of publications in that penumbral area between art and pornography, we do not find the judgment of the trial court to be "clearly erroneous" in any respect.

Accordingly the judgment is affirmed.

Clem F. Storckman, Presiding Judge.

Eager, J., & Broaddus, Sp. J., concur.

In the Supreme Court of Missouri,
En Banc.

In Re: Search Warrant of Property at 5 West 12th Street, Kansas City, Missouri, v. William Marcus et al.	No. 46,900-46,965

Per Curiam.

In their supplemental brief filed for the hearing before the court en banc the appellants in their points relied on make this additional contention:

"The divisional opinion holding the warrants to sufficiently describe the items to be seized is erroneous in condoning the issuance of a general warrant for the seizure of publications and thereby violates appellants' freedom of speech and press under the First Amendment to the Constitution of the United States and deprives them of their property without due process of law and their privileges and immunities as citizens as guaranteed by the due process and privileges and immunities clause of Amendment Fourteen of the United States Constitution."

This adds nothing to the scope of the contentions previously made and disposed of in the divisional opinion.

Appellants also cite Smith v. California, ... U. S. ..., 80 S. Ct. 215, 4 L. Ed. 2d 205, decided since the decision in division. In the Smith case an ordinance which had the effect of imposing a strict criminal liability upon a bookseller possessing an obscene book without a showing that he had knowledge of its contents was struck down as infringing upon constitutional rights. This is not a criminal proceeding and a lack of guilty knowledge is not claimed. Our attention is also called to Kingsley International Picture Corp. v. Regents of the University of the State of New York, 360 U. S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d 1512. Neither these nor the other cases cited repudiate previous holdings of the Supreme Court of the United States that obscene material is not within the protection of the constitutional guarantees of freedom of speech and the press. Roth v. United States, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498. In fact the Smith case reaffirms that proposition. Thus the purpose of the Missouri statute is not unlawful and we hold the procedures employed are in compliance with due process of law and not violative of other constitutional rights. The divisional opinion correctly rules the contentions made.

In the Circuit Court of Jackson County,
Missouri, at Kansas City,
Division No. 9.

In re: Search Warrant of Property at 3105 Euclid, Kansas City, Missouri.	
In re: Search Warrant of Property at 5 West 12th Street, Kansas City, Missouri.	
In re: Search Warrant of Property at 1 East 39th Street, Kansas City, Missouri.	No. .....
In re: Search Warrant of Property at 221 East 12th Street, Kansas City, Missouri.	
In re: Search Warrant of Property at 123 East 12th Street, Kansas City, Missouri.	
In re: Search Warrant of Property at 104 East 10th Street, Kansas City, Missouri.	

Opinion.

On October 10, 1957, pursuant to search warrants issued by this court under Section 542.380 of the Revised Statutes of Missouri 1949, the Jackson County Sheriff's Office and the Kansas City, Missouri, Police Department seized certain books, magazines and other printed matter, in the possession of a wholesale distributing company, located at 3105 Euclid Avenue, and in the possession of certain retailers located at 5 West 12th Street, 1 East 39th Street, 221 East 12th Street, 123 East 12th Street and 104 East 10th Street, all located in Kansas City, Jackson County, Missouri.

Pursuant to notices duly posted, as provided for in Section 542.400, Revised Statutes of Missouri 1949, the owners of said property appeared by attorneys, and a hearing, pursuant to Section 542.410, Revised Statutes of Missouri 1949, was held on the 23d day of October, 1957.

The following motions, and each of them, having been presented to the Court, after due consideration, are overruled:

a. Amended Motion of Ted's News Shop and Jack K. Rayburn for Immediate Return of Property Seized and to Quash Search Warrant.

b. Motion of Jack Gordon for Immediate Return of Property Seized and to Quash Search Warrant.

c. Amended Motion of Title News Company and William Marcus for Immediate Return of Property Seized and to Quash Search Warrant.

d. Amended Motion of Town Book Store and Harvey Hammer for Immediate Return of Property Seized and to Quash Search Warrant.

e. Amended Motion of Ruback's News Stand and Harvey Hammer for Immediate Return of Property Seized and to Quash Search Warrant.

f. Amended Motion of Kansas City Distributors and Homer Smay for Immediate Return of Property Seized and to Quash Search Warrant.

Periodicals, books, magazines and other printed matter were introduced in evidence as exhibits and it was stipulated by the parties that the same were kept for the purpose of public sale, distribution and circulation. The court has read and studied each of the exhibits so introduced.

Statutes Applicable.

The statutes applicable to the facts in this cause are as follows, to-wit: Section 542.380, Revised Statutes of Missouri, reads as follows:

"Upon complaint being made, on oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any of the property or articles herein named are kept within the county of such officer, if he shall be satisfied that there is reasonable ground for such complaint, shall issue a warrant to the sheriff or any constable of the county, directing him to search for and seize any of the following property or articles:" . . . .

"(2) Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz.: obscene, lewd, licentious, indecent or lascivious books, pamphlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letters, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly or indirectly, when, where, how or of whom any of such things can be obtained;" . . .

542.420. Disposition of Property.

"If the judge or magistrate hearing such cause shall determine that the property or articles are of the kind mentioned in Section 542.380, he shall cause the same to be publicly destroyed, by burning or otherwise, and if he find that such property is not of the kind mentioned, he shall order the same returned to its owner. If it appear that it may be necessary to use such articles or property as evidence in any criminal prosecution, the judge or magistrate shall order the officer having possession of them to retain such possession until such necessity no longer exists, and they shall neither be destroyed nor returned to the owner until they are no longer needed as such evidence."

The Question to Be Determined by the Court.

Were any or all of the publications and printed matter seized kept for the purpose of being sold, published, exhibited, given away, distributed or circulated, obscene, lewd, lascivious, indecent, or of an immoral or scandalous character?

Our courts have many times stated the test for determining obscenity in matters such as those before the court. Thus in the case of State v. Mac Sales Company, Mo. App., 263 S. W. 2d 860, l. c. 863, the St. Louis Court of Appeals said:

> "With reference to (4), supra, one test of obscenity is whether the article in question tends to deprave and corrupt the morals by inciting lascivious thoughts or arousing the lustful desire of those whose minds are open to such influences and into whose hands such a publication may fall." * * *

Again, in the case of State v. Pfenninger, 76 Mo. App. 313, the Court described obscenity as follows:

> "Obscenity is such indecency as is calculated to promote the violation of the law and the general corruption of morals. It is applied to language spoken, written or printed, and to pictorial productions and include what is foul and indecent, as well as immodest, or calculated to excite impure desires."

The Supreme Court of Missouri, in the case of State v. Becker, 272 S. W., page 282, decided October 11, 1954, speaking through Judge Conkling, said:

> "The words 'indecent, immoral or scandalous' as used in this statute, and particularly as used therein in connection with the words 'obscene, lewd, licentious and lascivious,' are not words of hidden or obscure or uncertain meaning. Those words are not technical

terms of the law. The word 'indecent' is a common word of common understanding. It has been defined to mean unfit to be seen or heard; immodest; gross, obscene; offending against modesty and less than immodest; that which would arouse lewd or lascivious thoughts in the susceptible."

Again the test of obscenity is set forth in 67 C. J. as follows:

"The words of the statute 'obscene, lewd, licentious, indecent, lascivious, immoral, scandalous' are used therein as descriptive of the character of the publication prohibited to be possessed with intent to sell or circulate, are all synonymous and of similar meaning. Those descriptive words are neither vague nor indefinite. They are words of common usage and understanding, and as used in this statute, and in law, they have a meaning understood by all."

After thoroughly studying the exhibits heretofore referred to, and in the light of the tests laid down by the courts of this State, I am of the opinion that the exhibits described in Schedule "A," which is attached hereto and made a part hereof, are obscene, lewd, licentious, lascivious, indecent and of an immoral and scandalous character within the meaning and intent of the Missouri Revised Statutes 1949, Section 542.380.

It is therefore the order of this court that the above-numbered exhibits, described in Schedule "A" attached hereto, and copies of said exhibits, all in the possession of the Sheriff of Jackson County, shall be retained by said officer, as necessary evidence for the purpose of possible criminal prosecutions, and when such necessity no longer exists that said exhibits, and copies thereof, be then publicly destroyed by burning or otherwise, as provided for by law.

The Court further orders that all exhibits set forth in Schedule "B," which is attached hereto and made a part hereof, and copies of said exhibits, all in the possession of said Sheriff of Jackson County, Missouri, be returned to the owners thereof.

A Judgment has been entered this day in conformity with the views expressed herein.

Ben Terte,
Judge.

Dated this 12th day of December, 1957.

Judgment of Missouri Supreme Court.

And on the 14th day of March, 1960, the following judgment was entered in said cause, to-wit:

(Caption omitted.)

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondents recover against the said appellants their costs and charges herein expended and have therefor execution (Opinion filed).

APPENDIX B.

Chapter 542.

Missouri Revised Statutes 1949.

* * * * * * * *

Section 542.380. Upon complaint being made, on oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any of the property or articles herein named are kept within the county of such officer, if he shall be satisfied that there is reasonable ground for such complaint, shall issue a warrant to the sheriff or any constable of the county, directing him to search for and seize any of the following property or articles:

* * * * * * * *

(2) Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz.: obscene, lewd, licentious, indecent or lascivious books, pamphlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letter, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly or indirectly, when, where, how or of whom any of such things can be obtained.

* * * * * * * *

Section 542.390. Warrant shall describe place and articles to be seized or searched for—power of officer.—Such search warrants shall describe the place to be searched or the things to be seized, as nearly as may be, and shall direct the officer serving the same to seize such articles and bring them before the judge or magistrate issuing the warrant. The officer who shall be charged with the

execution of any warrant specified in sections 542.380 and 542.390 shall have power, if necessary, to break open doors for the purpose of executing the said warrant, and for that purpose may summon to his aid the power of the county.

Section 542.400. Defendant to have notice of date of hearing.—The judge or magistrate issuing the warrant shall set a day, not less than five days nor more than twenty days after the date of such service and seizure, for determining whether such property is the kind of property mentioned in section 542.380, and shall order the officer having such property in charge to retain possession of the same until after such hearing. Written notice of the date and place of such hearing shall be given, at least five days before such date, by posting a copy of such notice in a conspicuous place upon the premises in which such property is seized and by delivering a copy of such notice to any person claiming an interest in such property, whose name may be known to the person making the complaint or to the officer issuing or serving such warrant, or leaving the same at the usual place of abode of such person with any member of his family or household above the age of fifteen years. Such notice shall be signed by the magistrate or judge or by the clerk of the court of such judge.

Section 542.410. Rights of property owners.—The owner or owners of such property may appear at such hearing and defend against the charges as to the nature and use of the property so seized, and such judge or magistrate shall determine, from the evidence produced at such hearing, whether the property is the kind of property mentioned in section 542.380.

Section 542.420. Disposition of property.—If the judge or magistrate hearing such cause shall determine that the

property or articles are of the kind mentioned in section 542.380, he shall cause the same to be publicly destroyed, by burning or otherwise, and if he find that such property is not of the kind mentioned, he shall order the same returned to its owner. If it appear that it may be necessary to use such articles or property as evidence in any criminal prosecution, the judge or magistrate shall order the officer having possession of them to retain such possession until such necessity no longer exists, and they shall neither be destroyed nor returned to the owner until they are no longer needed as such evidence.

Missouri Supreme Court Rules.

Rules of Criminal Procedure.

Rule 33.

Searches and Seizures.

Rule 33.01.—Searches and Seizures—Complaint—Search Warrant—Description of Property and Place. (a) If a complaint in writing be filed with the judge or magistrate of any court having original jurisdiction to try criminal offenses stating that personal property (1) which has been stolen or embezzled, or (2) the seizure of which under search warrant is now or may hereafter be authorized by any statute of this State, is being held or kept at any place, or in any building, boat, vessel, car, train, wagon, aircraft, motor vehicle or other vehicle or upon any person within the territorial jurisdiction of such judge or magistrate, and if such complaint be verified by the oath or affirmation of the complainant and states such facts positively and not upon information or belief; or if the same be supported by written affidavits verified by oath or affirmation stating evidential facts from which such judge or magistrate shall issue a search warrant directed

to any peace officer commanding him to search the place therein described and to seize and bring before such judge or magistrate the personal property therein described.

(b) The complainant and the warrant issued thereon must contain a description of the personal property to be searched for and seized and a description of the place to be searched, in sufficient detail and particularity to enable the officer serving the warrant to readily ascertain and identify the same.

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